No. 84-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PALESTINE BOONE,

Petitioner,

v.

MASS TRANSIT ADMINISTRATION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In the 31 pages of the Petitioner's Petition for Writ of Certiorari including the Statement of the Case, The Evidence, and the Rulings Below,[1] the central facts are obscured. Accordingly, the Respondent Mass Transit Administration (MTA) will set forth its own Statement of

[1] The Petition's format in this respect fails to comply with Rule 21 of the Supreme Court Rules.

the Case in order to emphasize some important particulars.

The MTA is a unit within the Maryland Department of Transportation, a principal department of State government. Maryland Code, Transportation Art. §§ 2-101, 2-107(a)(3), 7-201. The MTA's legislative mandate is to develop and operate transit facilities within the Metropolitan Transit District, encompassing Baltimore City, Baltimore County, and Anne Arundel County.[2] Maryland Code, Transportation Art., §§ 7-101(d), 7-102. The Maryland Legislature has determined that the activities of the MTA "are essential governmental functions," and has bestowed upon the MTA the right to determine the qualification and appointment of its employees without regard to the laws of Maryland relating to other State employees. Maryland Code, Transportation Art., §§ 7-206(a)(2), 7-704.

In recent years, the MTA has employed approximately 2,000 people in its Bus Division. In the course of fulfilling its public role, during the mid-1970s the MTA transported over 120,000,000 passengers per year, and covered approximately 25,000,000 miles annually. Applicants for positions as bus drivers with the MTA, as well as bus driver applicants elsewhere, have had to meet certain physical standards which were developed by a group of physicians. Among these MTA standards was the requirement that an applicant be between 5′6″ and 6′2″ tall without shoes, and it is this physical standard with which Petitioner took issue in this case.

The Petitioner Palestine Boone instituted this litigation during February, 1980 alleging that the MTA dis-

[2] The MTA may also contract to provide transit facilities and services in any Maryland county continguous to the Metropolitan Transit District. Maryland Code, Transportation Art., § 7-204(f).

criminated against her during 1974 in contravention of Title VII of the Civil Rights Act of 1964, when it declined to hire her as a bus driver. The MTA contended that Petitioner's claim was precluded by laches, that its then existing height requirement did not discriminate, and that, in any event, the height requirement was a bona fide occupational requirement and/or a business necessity. The bona fide requirement arose from the physical realities of transit equipment which was in service when the height standard was extant; as newer coaches were designed, developed and acquired by the MTA during the 1970s, their full-vision windshields obviated the need for the requirement, it was eventually discarded, and Petitioner was hired by the MTA as a bus operator beginning in 1979. This uncontradicted factual setting is the determinative element in this case.

After entering into stipulations, and agreeing that material facts were not in dispute, each of the parties moved for summary judgment. After the cross motions were argued, Judge Ramsey issued a Memorandum and Order granting the MTA's motion concluding that the MTA's height standard was, at the time in question, a bona fide occupational qualification. Petitioner then noted an appeal to the United States Court of Appeals for the Fourth Circuit which affirmed the decision of the District Court.

Petitioner first applied for employment as a bus operator with the MTA during 1973 when she was 21 years of age. When Petitioner was called to the MTA for interview and examination during August, 1974, she was denied employment because she did not meet the height requirement. When she first applied with the MTA in 1973, her Maryland driver's license indicated that her height was 4'11". During this period of time, when the MTA advertised for applicants for the position of bus

driver, the height standards were set forth among the requirements.

After being denied employment by the MTA, Petitioner filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that the MTA had violated Title VII because the height requirement allegedly discriminated against her on the basis of sex. On September 16, 1975, the EEOC issued a written determination finding "reasonable cause to believe" that the MTA had violated Title VII.

Thereafter, as a result of administrative negotiation and attempts at conciliation, the MTA agreed to afford Petitioner an actual opportunity to be tested on MTA equipment then in use in order to determine whether she was capable of safely operating all coaches. Such testing was carried out in March, 1976. The testing procedure was observed by MTA safety personnel who concluded that Petitioner was not able to safely operate the older type equipment then in service. Specifically, it was determined that Petitioner had difficulty depressing the brake pedal, and would be unable to see a small child stepping off the curb to the driver's right. As a result of this testing, the MTA continued its refusal to hire Petitioner.

On May 10, 1976, the MTA Administrator made a policy determination that the height requirement would no longer be enforced on a "cut and dried" basis, but that applicants who might not be able to safely operate the equipment would be given an opportunity for actual examination on board a bus; it was also determined that the height requirements would no longer be used by the MTA in the course of its advertising for applicants. Beginning in 1973, and through May 10, 1976, applicants between 5′5″ tall and 5′6″ tall, and those between 6′2″ and 6′3″ tall had been actually tested by the MTA on buses to determine whether they could safely operate the coaches.

After May 10, 1976, applicants under 5′6″ tall were given safety checks which included testing on "old-type" coaches (series 1900-1949) when this equipment was in general service, and did not include such testing after a point when the utilization of "old-type" coaches became *de minimus*. Not surprisingly, some applicants successfully passed these safety checks, while others did not. Petitioner was one of the applicants who did not pass the equivalent of such a safety check on the "old-type" coach.

At the crux of this case is the fact that during the 1970s, the composition of the MTA's bus fleet changed significantly. Older type coaches which comprised over 20% of the MTA's fleet through the mid-1970s featured two windshield panels, each of which was only 20½″ high. Newer style coaches, which the MTA had been phasing in over the years, featured, among other improvements, full vision windshields which extended from approximately an operator's knee cap level to the ceiling of the coach. The configuration of the older style coach was such that operators who were under 5′6″ tall or over 6′2″ tall had a limited range of vision, a situation that did not prevail on the newer models. Diagrams of the older and newer style coaches appear in the record.

During March, 1978, Petitioner again applied for employment with the MTA as a bus operator, and was called down for examination and interview in December, 1978. By this time, the older model coaches comprised less than 2% of the MTA's fleet, and Petitioner was employed beginning January 5, 1979 as an operator assigned to the Harford Division where there were no old style coaches. It was stipulated that Petitioner's allegations have nothing to do with her actual employment by the MTA.

ARGUMENT

In her Petition for Writ of Certiorari the Petitioner essentially contends that the unpublished decision of the

Court of Appeals in this case creates a conflict among the Courts of Appeal, and that the decisions below were deficient. On the contrary, there exists no conflict whatever among the circuits on the issues involved here, and the decisions of both courts below were correct.

I. Absence of Conflict Among the Circuits

The decisions of the United States Court of Appeals for the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), and *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), do not conflict with the decisions here. *Diaz* and *Weeks* both considered situations where employers admitted that they discriminated on the basis of sex, and ability to do the job was not considered. 442 F.2d at 386; 408 F.2d at 231. In *Weeks*, the defendant introduced "no evidence" that women could perform the job (408 F.2d at 234), and in *Diaz*, the Court declined to allow an employer's "preference" for women to rise to a business "necessity" (442 F.2d at 388-89). In *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977), this Court generally characterized *Weeks* and *Diaz* to stand for the proposition that Title VII precludes refusals to hire individuals on the basis of "stereotypical characterizations of the sexes." The MTA's height standard did not consider an applicant's sex, and was proven, without contradiction, to be a legitimate BFOQ. Indeed, the record showed that for many years the MTA has been hiring more female than male bus drivers, which becomes especially significant when it is recognized that many more men than women have applied for the jobs.

In *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 53-54 (8th Cir. 1977), the Court sustained a height requirement as a business necessity where it was shown that one's ability to function properly as an airline flight officer was dependent upon height, which was "essential to the safe and

sufficient operation" of an airplane. The evidence in the case at bar "convinced" the District Court that the MTA's height requirement was essential to the safe and efficient operation of its business as a public carrier, and was certainly "reasonably necessary" to the normal operation of the MTA's business (A. 18). *See* 42 U.S.C. § 2000e-2(e)(1).

The public's interest and safety "is paramount and justifies high employment standards." *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977). Where "the economic and human risks" involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972); *Boyd v. Ozark Air Lines, Inc., supra*, 568 F.2d at 54.

Courts have recognized "the significance of safety to passengers and members of the public" in the context of the busing industry and job standards for bus drivers. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976). In *Usery*, in the course of considering the legality of a bus company's policy of refusing to consider applications from individuals above a certain age, the court concluded "that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb." *Id.; Murnane v. American Airlines, Inc.*, 482 F. Supp. 135, 147 (D.D.C. 1979).

II. Correctness of the Decisions Below

In the course of determining the merits of the case, the trial court assumed without deciding that Petitioner could prove a prima facie case of discrimination (A. 17), and went on to consider whether the MTA's height requirement was a bona fide occupational qualification

(BFOQ) for purposes of 42 U.S.C. § 2000e-2(e)(1). Believing that the BFOQ defense is viable in this case, and recognizing that *no evidence was offered* to counter the bona fides of the height requirement, the MTA will focus its attention on that aspect of the case.

Judgment was properly entered in favor of the MTA because the height requirement constituted a BFOQ and business necessity with respect to the MTA while that standard was in effect. It is not "an unlawful employment practice for an employer to hire and employ employees" on the basis of "a bona fide occupational qualification reasonably necessary to the normal operation of" the employer's "particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). The purpose of Congress in enacting Title VII was:

> The removal of artificial, abritrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Standards that are "demonstrably a reasonable measure of job performance" are permissible, and, indeed, "controlling." *Id.* at 436. Because the MTA's height requirement was "necessary to safe and efficient job performance," Petitioner's Title VII challenge must fail. *Dothard v. Rawlinson, supra,* 433 U.S. at 331 n.14; *Griggs v. Duke Power Co., supra,* 401 U.S. at 431.[3]

As a procedural matter, petitioner essentially failed to effectively address or contradict the evidence produced on

[3] Apparently, there is some question whether the "business necessity" and "bona fide occupational qualification" defenses to Title VII claims are equivalent. *See* Harriss v. Pan American World Airways, Inc., 649 F.2d 670, 674 (9th Cir. 1980). The *Harriss* case suggests that the business necessity defense would be applicable here because the MTA's height standard is facially neutral. *Id.* Whether the defenses are distinct, the MTA submits that its height standard passes muster under both.

behalf of the MTA. The MTA submitted that the configuration of "old-type" buses was such that drivers under 5'6" or over 6'2" had a limited range of vision, which was an actual, not imagined, reality. As the "old-type" buses were phased out, they were replaced with newer models which had full-vision windshields.

Once the MTA came forward and carried its burden of proving a BFOQ defense, it was then incumbent upon the Petitioner to produce evidence in derogation of the MTA's proof in this regard. No such counter-evidence was ever brought forward. While the Petitioner takes occasional potshots at the MTA's showing (*e.g.* Petition at 28-29), these do not overcome the deficiencies in the record from the Petitioner's standpoint. It seems strange indeed that the Petitioner who stipulated that no facts were in dispute, and never refuted the MTA's evidence, now finds fault with the agreed upon facts.

Petitioner's reliance upon *Dothard v. Rawlinson, supra,* and 29 C.F.R. §§ 1607.1 *et seq.* is sorely misplaced. In *Dothard* the female plaintiff had been denied employment as an Alabama prison guard because she failed to meet the minimum weight requirement. 433 U.S. at 323-24. A minimum height requirement also existed, and the plaintiff attacked both standards as violative of Title VII. In marked contrast with the record in the instant case, in *Dothard* the State of Alabama "*produced no evidence*" correlating its requirements with job performance, and "*failed to offer evidence of any kind* in specific justification" of the standards. 433 U.S. at 331 (emphasis supplied). In further contrast with the case at bar, in *Dothard* the plaintiff adduced evidence showing that the requirements were not job related. Unlike the defendant in *Dothard,* the MTA in this case proved to the trial court that its height requirement was a BFOQ for purposes of Title VII (A. 24). It is submitted that the MTA's standards in this case properly measured "'the person for the job and not the

person in the abstract.'" *Dothard v. Rawlinson, supra,* 433 U.S. at 332; *Griggs v. Duke Power Co., supra,* 401 U.S. at 436. Curiously, in her formulation of the Question Presented in her Petition, the Petitioner casts aspersions upon "subjective" evaluation of job applicants. This sort of subjective consideration is precisely what Title VII is all about.

The MTA not only serves the public, but itself is a public agency. The public's safety is and has been of paramount importance to the MTA, and as one means of protecting the public, the MTA has developed, with the input of private physicians employed for the purpose, physical standards for the employment of new bus operators. Thus, the height standard was professionally determined, and it has been shown that because of the configuration of the old type coaches contained within the MTA's fleet, persons less than 5'6" tall and over 6'2" tall could not safely operate the equipment because of limited vision. The height standard was plainly motivated by the MTA's "interest in operating a safe and efficient transportation system rather than by any special animus against a specific group of persons." *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 593 n.40 and 594 (1979). Although a classification will be upheld if it "is reasonable in substantially all of its applications," and will not be stricken "simply because it appears arbitrary in an individual case," when this particular applicant was actually tested on the old type equipment, her vision was, *in fact,* limited and she had difficulty in other areas as well. *O'Connor v. Board of Educ.,* 449 U.S. 1301, 1306 (1980) (Stevens, J., as Circuit Justice). Finally, it should not be overlooked that Petitioner did not offer any proof of damage, which of itself is dispositive of this case.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit is not in conflict with *Weeks*, *Diaz* or any other decision of a United States Court of Appeals. Neither has the Petitioner demonstrated any special or important reasons for granting a writ of certiorari, nor any public purpose to be served thereby. For the foregoing reasons, the Respondent Mass Transit Administration prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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